92-1456

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PARISH OF ST. TAMMANY, *et al.*,
Petitioners

v.

VONDERHAAR, *et al.*,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do Respondents meet the requirements of a case or controversy under Article III of the Constitution of the United States (Standing) to make a First Amendment challenge to the St. Tammany Parish ordinance which prohibits dancing in G-strings and pasties where Respondents' action arises solely from conduct in an establishment that is licensed to sell, and sells, alcoholic beverages when the state is given great latitude to regulate such conduct by the Twenty-first Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 10, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears as Appendix A hereto. That Opinion affirmed the Judgment by the district court denying the preliminary injunction and decided that the district court may hold the case in abeyance until the final court in Louisiana has ruled. The opinion of the district court, not reported, appears in Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 10, 1992 and appears as Appendix C hereto.

Petitioner made no application for rehearing and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

St. Tammany Parish Police Jury Ordinance No. 91-1535.

STATEMENT OF THE CASE

This action involves the question of whether plaintiffs have standing to challenge in Federal Court the enforcement of a validly enacted penal ordinance of St. Tammany Parish which regulates nude conduct in a nightclub which is licensed to sell and sells alcoholic beverages. Plaintiffs filed suit in United States District Court for the Eastern District of Louisiana attempting to have the federal court enjoin enforcement of the ordinance which restricts dancers in nightclubs to a certain level of dress.

At all proceedings below, in the United States District Court for the Eastern District and in the United States Court of Appeal for the Fifth Circuit, St. Tammany Parish has challenged the ability of plaintiffs to maintain an action in federal court which attempts to enjoin a validly enacted ordinance regulating the conduct which will be allowed in nightclubs which serve alcoholic beverages to the general public. St. Tammany Parish has consistently maintained that the 21st Amendment to the United States Constitution governs and that there is no case or controversy under the First Amendment. Plaintiffs lack standing in Federal Court to challenge a validly enacted ordinance regulating conduct in nightclubs which

serve alcoholic beverages. As an aid to the court in understanding the proceedings below, St. Tammany Parish supplies the following chronology:

1. On January 2, 1992 Plaintiffs filed a Motion for a Temporary Restraining Order in the United States District Court requesting that petitioner, St. Tammany Parish, be prohibited from enforcing an ordinance validly enacted by the St. Tammany Parish Police Jury.

2. On January 2, 1992, the temporary restraining order was denied.

3. On January 7, 1992 plaintiffs filed a motion for preliminary injunction.

4. On January 29, 1992, St. Tammany Parish, Petitioners, filed a motion to dismiss for lack of justiciable controversy.

5. On February 5, 1992 a hearing was held on the Motion for a Preliminary Injunction in the United States District Court.

6. On February 19, 1992, the United States District Court Judge issued Orders and Reasons for Judgment on the Plaintiff's Motion for Preliminary Injunction and St. Tammany Parish Motion to Dismiss.

7. The United States District Judge denied Petitioner's Motion for a Preliminary Injunction saying:

> . . . the court finds that the plaintiffs have failed to prove a likelihood of success on the merits at this time and, consequently fail to meet the requisites for a preliminary injunction to issue.

8. On March 18, 1992, Respondents filed an appeal from the denial of their Motion for Preliminary Injunction.

9. On May 29, 1992, St. Tammany Parish filed a Motion to Dismiss for Res Judicata in the United States District Court.

10. On June 22, 1992, the United States District Court Judge denied the St. Tammany Parish Motion to Dismiss for Res Judicata and ordered that the case "be STAYED and CLOSED for statistical purposes pending resolution of the state court proceedings and the plaintiffs' appeal to the U.S. Court of Appeals for the Fifth Circuit".

11. On December 10, 1992, the Fifth Circuit Court of Appeals affirmed the judgment of the District Court denying Plaintiff's Motion for a Preliminary Injunction.

12. Within ninety (90) days of the Fifth Circuit's judgment the Petitioner brought this action requesting certiorari.

St. Tammany Parish, Petitioner herein, maintains that the decision of the United States Court of Appeals for the Fifth Circuit, which refused to find that plaintiffs lacked standing, was an error which this court should reverse because, as such, no federal subject matter jurisdiction exists.

REASONS FOR ALLOWING THE WRIT

Summary

> Plaintiffs have no First Amendment right at all to dance in an establishment that is licensed to sell and sells alcoholic beverages because the Twenty-first Amendment, not the First Amendment, applies where the sale of alcoholic beverages is involved.

The Twenty-first Amendment of the United States Constitution gives the states great latitude to regulate the sale of alcoholic beverages and states may delegate that power to their political subdivisions as they see fit. The St. Tammany Parish Ordinance is a legitimate exercise of St. Tammany Parish's power to regulate alcohol which the State of Louisiana delegated to them; thus appellants do not have standing to bring a First Amendment challenge.

ARGUMENT AMPLIFYING THE REASONS

Respondents will not be able to demonstrate the elements necessary for standing under Art. III of the United States Constitution. Article III requires an actual case or controversy before the court. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975).

Respondents do not have standing to make a First Amendment challenge to the St. Tammany Parish Ordinance because dancing in G-strings and pasties in an establishment that sells alcoholic beverages is regulated under the Twenty-first Amendment.

In *Barnes v. Glen Theatre, Inc.*, the Supreme Court held that nude dancing is expressive conduct on the outer perimeters of the First Amendment but only marginally so. *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456, 115 L.Ed. 504 (1991). Therefore, only minimal First Amendment rights are involved where *any* nude dancing is concerned.

Plaintiffs were not dancing just anywhere, they were in an establishment that sells alcoholic beverages. St. Tammany Parish Police Jury acknowledges that if plaintiffs were dancing in an establishment owned and operated by a little old lady selling cookies and milk then plaintiffs would have standing to challenge the ordinance on First Amendment grounds. But that is not the case here, where plaintiffs were dancing in an establishment that sells alcoholic beverages.

Plaintiffs do not have any First Amendment rights at all to dance in an establishment that sells alcoholic beverages because the Twenty-first Amendment, not the First Amendment, applies where the sale of alcoholic beverages is involved. The Twenty-first Amendment has given the state great latitude to regulate establishments that sell alcoholic beverages.

> While the States, vested as they are with general police power, require no specific grant of authority

> in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health and welfare.

California v. LaRue, 93 S.Ct. 390, 395, 409 U.S. 109, 114 (1992).

In *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir.1990), an Eighth Circuit Federal Court analyzed two Supreme Court cases which prohibited the exposure of any portion of the human genitals or anus and also any portion of the female breast below the areola in establishments where alcohol was consumed on the premises. *Walker*, at page 91-92 analyzing *California v. LaRue*, 409 U.S. 190 (1972) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981).

The court in *Walker* stated:

> Kansas City could have altogether forbidden any number of activities from taking place in the Last Chance Lounge, not the least of which is "*exotic dancing*" as defined in . . . the zoning ordinance . . . Walker simply has *no First Amendment right to display "go-go girls" in a drinking facility. His First Amendment rights cannot, therefore have been violated by this zoning ordinance* . . .

Walker, 911 F.2d at 92.

While St. Tammany's Ordinance is a criminal ordinance regulating nudity in a commercial and public establishment as compared to the *Walker* case which involved a zoning ordinance applying only to barrooms, the same rationale applied in *Walker* should be applied to the instant case. Specifically, because zoning and criminal ordinances are both exercises of the governmental police power and because the facts of this case, like the facts in *Walker*, apply specifically to a bar owner, appellants have

no First Amendment right to display nude dancing and cannot claim a constitutional injury.

In the case of *New York State Liquor Authority v. Bellanca*, *supra*, this Court found that the states' power to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment Interest in nude dancing and that a state could therefore ban such dancing as part of its liquor license control program.

> "Although the customary 'bar-room' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstance. *In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program.*" (emphasis added)

New York Liquor Auth. v. Bellanca, 452 U.S. 712, 69 L.Ed. 645, 101 S.Ct. 2599 citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

In *Bellanca* this Court held nude dancing might be entitled to First Amendment protection under *some* circumstances, but nude dancing in establishments that sell alcoholic beverages is regulated by the Twenty-first Amendment. Thus, nude dancing in establishments that sell alcoholic beverages does not merit protection under the First Amendment. Following the rationale of *Bellanca* and *Walker*, *supra*, the owners, operators, and entertainers of the Scuttlebutt do not merit protection under the First Amendment.

This Court has held that the Twenty-first Amendment gives broad power to the states to regulate the sale of alcoholic beverages, and states may delegate this power as they see fit.

> The Twenty-first Amendment has given broad power to the States and generally they may delegate power as they see fit.
>
> There is certainly no constitutional requirement that the same government unit must grant liquor licenses, revoke licenses, and regulate the circumstances under which liquor may be sold.

City of Newport v. Jacobucci, 479 U.S. 92, 96, 107 S.Ct. 389, 93 L.Ed. 2d 334, 339 (1986).

Therefore, the State of Louisiana has the power to regulate the sale of alcoholic beverages and can delegate this authority to the Parish.

Louisiana State District Court Judge A. Clayton James in his reasons dated March 20, 1992 stated:

> It's clear as Judge Arceneaux noted in his reasons of February 18, 1992 that the state did delegate to the parish the right in its exercise its police power to regulate the business of selling alcoholic beverages to the extent necessary for the protection of the public, morals, safety and peace.

The St. Tammany Parish Ordinance is a legitimate exercise of the State of Louisiana's power to regulate alcohol. Thus it is governed by the Twenty-first Amendment, and appellees do not have any standing to bring a claim to enjoin the enforcement of the ordinance.

Furthermore, the St. Tammany Parish ordinance merely regulates the *conduct* of the dancers in establishments that sell alcoholic beverages, and not their expression. Therefore, no First Amendment scrutiny is required to determine whether or not the ordinance is Constitutional. Justice Scalia, concurring in *Barnes*, stated:

> But virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition.
>
> .....
>
> It cannot reasonably be demanded, therefore that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, see e.g., *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1678, 1679, 20 L.Ed.2d 672 (1968)—that it be justified by an "important or substantial" government interest. Nor do our holdings require such justification: we have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

Justice Scalia concurring in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ——, 111 S.Ct. 2456, 2463, 115 L.Ed. 2d 504 (1991).

Additionally, Justice Scalia asserts that the test for conduct is merely whether the government prohibits conduct "precisely because of its communicative attribute." *Barnes*, 111 S.Ct. at 2466.

The St. Tammany Parish ordinance was passed to prohibit the *conduct* of the nude dancers, and not to suppress any communicative intent of the dancers. Thus, the ordinance is not subject to First Amendment Scrutiny.

In summary, Plaintiffs have no First Amendment right to dance nude in establishments that sell alcoholic beverages. Nude or partially nude dancing in establishments that sell alcoholic beverages is governed by the Twenty-first Amendment. Further, the St. Tammany ordinance merely regulates the conduct of Scuttlebutt dancers, and is not directed at any expression of that conduct. There-

fore, the plaintiffs lack standing under Article III case or controversy requirements to bring a First Amendment challenge against the ordinance.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit, reversing that courts affirming of the District Court's decision to maintain the action, pending the outcome of the state court proceedings. In addition, this court should find that plaintiffs have no standing in federal court to challenge a validly enacted ordinance regulating conduct which takes place in nightclubs which dispense alcohol.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3266

JOHN VONDERHAAR, *et al.*,
Plaintiffs-Appellants,

versus

PARISH OF ST. TAMMANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 82 6 K)

[Filed Nov. 18, 1992]

Before WISDOM, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decided particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The denial of the preliminary injunction is affirmed, given the state of the record before us. Our ruling should in no way be construed as expressing any view on the ultimate merits of the plaintiffs' claims. If the district court concludes that issues of state law are presently pending before the courts of Louisiana in the concomitant state lawsuit, which are critical in the determination of this case, the district court may, in its discretion, hold this case in abeyance until the final court in Louisiana has ruled.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 92-0006
SECTION "K" (3)

JOHN VONDERHAAR, FRANK HAINES, and
MARY M. YELVERTON

versus

PARISH OF ST. TAMMANY and the
ST. TAMMANY POLICE JURY

[Filed Feb. 18, 1992]

ORDER AND REASONS

Plaintiffs, John Vonderhaar, Frank Haines, and Mary M. Yelverton, have moved for a preliminary injunction to enjoin the defendants from enforcing St. Tammany Parish Police Jury Ordinance No. 91-1535. Defendants, the Parish of St. Tammany and the St. Tammany Police Jury (collectively referred to herein as the "Parish"), have moved for dismissal in response to plaintiffs' application for the preliminary injunction. The court has heard oral argument and has carefully reviewed the pleadings, the attached papers, and the memoranda of counsel, and now rules on the motions to dismiss and for a preliminary injunction.

BACKGROUND

The St. Tammany Parish Police Jury passed Ordinance No. 91-1535 on December 19, 1991.[1] This ordinance pro-

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[1] The ordinance prohibits "nude or partially nude dancers, hosts, hostesses, waiters, and waitresses from commercial and public estab-

hibits certain employees in commercial or public establishments from being nude, or partially nude, and makes a violation of the ordinance punishable as a misdemeanor.

Plaintiff, John Vonderhaar, opened a cocktail bar known as "Scuttlebutt" in St. Tammany Parish near the City of Slidell on December 12, 1991. In addition to serving alcohol, Scuttlebutt features live entertainment, which includes exotic dancing by women clothed in pasties and G-strings. Frank Haines, the owner/lessor of the premises on which Scuttlebutt is located and the manager of the lounge, and Mary Michele Yelverton, a dancer employed by Scuttlebutt, also have joined in this suit as plaintiffs.

The plaintiffs commenced this action on January 2, 1992, by filing a complaint invoking the court's federal question jurisdiction.[2] 28 U.S.C. § 1331 (Supp. I 1989). Plaintiffs seek relief in the form of a permanent injunction and a declaration that the ordinance at issue violates the First and Fourteenth Amendments to the United States Constitution. In addition, the plaintiffs seek compensatory damages and attorneys fees and costs.

Judge Martin L.C. Feldman denied a motion for a temporary restraining order filed contemporaneously with the complaint. In so doing, Judge Feldman ruled that plaintiffs had failed to establish the potential for irreparable injury under Rule 65 of the Federal Rules of Civil Procedure.

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lishments located within the unincorporated areas of the parish . . . ." St. Tammany Parish, La., Ordinance 90-1535 (Dec. 19, 1991). "Nude" or "partially nude" are defined as less than completely or opaquely covering and exposing the human genitals, pubic region, all of the buttocks area, and the female breast area below a point immediately above the top of the areola (i.e., nipple). *Id.* A violation of the ordinance is punishable as a misdemeanor.

[2] On January 7, 1992, plaintiffs' counsel filed an amended complaint substituting Tracey Moore, an original plaintiff, with Mary M. Yelverton.

Plaintiffs filed a motion for a preliminary injunction on January 7, 1992, and noticed this motion for hearing on January 22, 1992. The court subsequently granted the defendants' motion for a continuance of this hearing until February 5, 1992.

Defendants filed the instant motion to dismiss on January 28, 1992, and noticed this motion for hearing on February 19, 1992. Because the motion to dismiss involved issues pertinent to the motion for a preliminary injunction, the court entered a minute entry re-setting the hearing on defendants' motion to February 5, 1992. Counsel have filed timely oppositions to both motions.

DISCUSSION

I. The Motion to Dismiss

The defendants, in their motion to dismiss, contend that the plaintiffs have no standing to bring this action. The Parish attempts to support this contention by relying on the authority provided to states under the Twenty-First Amendment to the United States Constitution to regulate the sale and dispensing of liquor.

The court finds the lack of standing claim to be totally without merit; the plaintiffs have standing to contest the validity of the subject ordinance. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The United States Supreme Court, in addressing the issue of standing has noted that, at a minimum, standing requires a party who invokes a federal court's jurisdiciton to show that: (1) he or she has suffered actual or threatened injury as a result of the defendant's putatively illegal conduct; (2) the injury may be fairly traced to the challenged action; and, (3) a favorable decision may redress the alleged wrong. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). As applied to the instant action, the court finds the plaintiffs before it satisfy the requisites for standing.

Indeed, if the present plaintiffs did not have standing, the court would be hard-pressed to imagine anyone who would.

Federal question jurisdiciton exists whenever a claim arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (Supp. I 1989). The United States Supreme Court in *Barnes v. Glenn Theatre, Inc.*, 111 S. Ct. 2456 (1991), held that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* at 2460. Plaintiffs have brought this suit alleging that the defendants have infringed upon their alleged First Amendment right to engage in a form of nude dancing and seek this federal court's intervention to redress injuries allegedly suffered by them.

The defendants offer misplaced arguments in support of their standing-based motion to dismiss. In essence, the defendants rely on the Twenty-First Amendment and the jurisprudence interpreting it to argue that the plaintiffs have no constitutional right to offer nude dancing in an establishment serving alcohol. *See City of Newport v. Iacobucci*, 479 U.S. 92 (1986); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *Walker v. City of Kansas*, 911 F.2d 80 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2234 (1991). The jurisprudence cited by the defendants lends credence to its arguments concerning a state's broad authority to regulate the sale of alcohol. These cases, however, do not strip a federal court of jurisdiction to hear a controversy involving an interpretation of the United States Constitution and its amendments.

The plaintiffs, therefore, have made sufficient allegations to support federal jurisdiction. For these reasons, the defendants' arguments to defeat jurisdiction fail to persuade the court.

II. Motion for a Preliminary Injunction

The court next will address the plaintiffs' application for a preliminary injunction. In so doing, the court finds that the plaintiffs fail to meet the burden of establishing the first ground necessary for such injunction; that is, a likelihood of success on the merits.

The court previously noted that the Supreme Court in *Barnes* pronounced that nude dancing should be afforded some sort of constitutional protection. Obviously, the plaintiffs and the defendants disagree as to the extent of the constitutional protection to be afforded. In fact, the Parish apparently argues that the Twenty-First Amendment effectively negates any protection afforded nude dancing under the First Amendment where the regulation if such activity occurs incident to the sale and dispensing of alcohol.

Defendants, however, generally assert the propriety of the St. Tammany Parish Police Jury adopting the subject ordinance on two theories:

> First, that it is a valid exercise of the police power of the parish, as a political subdivision of the state; and,
>
> Second, that it is specifically authorized and validated as an aspect of state preserved power to regulate the sale and dispensing of alcoholic beverages under the Twenty-First Amendment to the United States Constitution.

The court will deal with these two theories, seriatim.

A. The Ordinance

The ordinance at issue has two aspects: it amends Chapter 3 of the St. Tammany Parish Code of Ordinances (the "Code" or "Code of Ordinances"), in two specific areas, *and* it amends Chapter 15 of that same code.

Chapter 3 of the Code deals with, among other things, the regulation of alcoholic beverages and sets forth a detailed plan for doing so.

The ordinance works two specific amendments in Chapter 3. First, it amends article VI, by adding section 3-139.01, characterized as "disorderly conduct", which, essentially, prohibits nude dancing and defines that term. The second amendment to Chapter 3 appears in article VII, by inserting section 3-176.01, which generally tracks the same language as inserted in section 3-139.01 of article VI. The two amendments are made necessary because article VI deals with regulation of liquor-dealing establishments in St. Tammany Parish Wards two and six, while article VII deals with such activities in other wards of St. Tammany Parish.

Chapter 15 appears to be the general criminal law section of the St. Tammany Parish Code of Ordinances. The ordinance amends Chapter 15 by labelling as disorderly conduct the same kind of nude dancing prohibited by virtue of the prior amendments made specifically applicable to persons selling alcoholic beverages.

It is important, therefore, that the court test both the general criminal conduct aspects and the liquor selling aspects of this ordinance, separately.

1. General Police Power

The court first analyzes whether the police jury exceeded its general police power in enacting this statute. It is so basic as to require no citation of authority to concede the right of a government to exercise its police power in support of its inherent obligation to protect the lives, property, and welfare of its citizens.

Louisiana law clearly permits and authorizes police juries and other parish governing authorities to exercise a number of specified powers. Section 33:1236 of the Louisiana Revised Statutes sets forth in some detail the

powers that such agencies may exercise. *See* La. Rev. Stat. Ann. § 33:1236 (West 1988 & Supp. 1992). The power to regulate obscenity, however, is rooted not in this statute but in a special provision of law; that is, section 14:106 E of the Louisiana Revised Statutes.

Section 14:106 of Louisiana's criminal laws establishes defines, and penalizes the state crime of obscenity. *See* La. Rev. Stat. Ann. § 14:106 (West 1986). Subsection E grants similar authority to local governments and reads:

> E. This Section does not preempt, nor shall anything in this Section be construed to preempt, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments; however, in order to promote uniform obscenity legislation throughout the state, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments shall not exceed the scope of the regulatory prohibitions contained in the provisions of this Section.

Id. § 14:106 E. Clearly, this special statute, while preserving the parish's authority to regulate obscenity, against what would otherwise amount to state preemption also limits its power to do so.

In dealing with the general criminal aspect first, it would seem clear that, by whatever name the offense may be called, St. Tammany Parish is attempting to regulate the crime of obscenity by amending Chapter 15 of its Code of Ordinances. It may do so only under the authority, but subject to the standards, the state has set forth in section 14:106 of the Louisiana Revised Statutes. The state statutes require that such regulation be uniform, and must not exceed the scope of the regulatory prohibitions contained in the provisions of the state law that authorize parishes to deal with the offense on a local basis.

The standards of what constitutes nudity differ substantially between the state statute and the St. Tammany Parish ordinance. Specifically, the state regulatory pattern contained in section 14:106 of the Louisiana Revised Statutes requires only "pasties" for breast covering and "G-strings" for the pubic/buttocks areas. The St. Tammany Parish ordinance, however, requires the "complete or opaque covering of all of the buttocks area and of the female breast area below a point or immediately above the top of the areola."

To the extent, then, that the St. Tammany Ordinance exceeds the scope of the state regulatory statute on that same subject, the Parish has exceeded the authority granted to it by the state to regulate obscenity. The ordinance does not comply with the uniformity requirement and it exceeds the scope of the regulatory provisions of the state statute.

Section 3-176.01, dealing generally with the offense of disorderly conduct, therefore, would appear to be null and void as exceeding the authority of the St. Tammany Police Jury to enact it. Plaintiffs, however, operate an establishment serving alcohol. Thus, this court must construe the ordinance at issue as it applies to the parties before it.

2. Twenty-First Amendment Authority

The court, therefore, now turns to the other two sections of the ordinance—the alcoholic beverages sections. The Parish specifically relies on the power to regulate liquor in defending the ordinance.

First, it is beyond peradventure that the Twenty-First Amendment to the United States Constitution grants to the states power to regulate the "delivery or use therein of intoxicating liquors." *See* U.S. Const. amend. XXI, § 2; *Bellanca*, 452 U.S. at 715. It is also beyond preadventure that this power, while constitutionally granted to the states, may nevertheless be delegated in whole or

in part by them to their political subdivisions. *Iacobucci*, 479 U.S. at 385; *Walker*, 911 F.2d at 91-92. Louisiana has accomplished this delegation in two ways.

The court refers to the general powers granted to local governing authorities by virtue of section 33:1236(6) and section 26:493 of the Louisiana Revised Statutes. *See* La. Rev. Stat. Ann. § 33:1236 (West 1988 & Supp. 1992); La. Rev. Stat. Ann. § 26:493 (West 1989). Plaintiffs would have the court read the latter-cited of these statutes to require that any regulation undertaken by the parish pursuant thereto be deemed simply an exercise of one aspect of the state's police power; thus, they assert, once the ordinance is so characterized, its incidental restriction of First Amendment freedoms is subject to, and founders upon, the review and analysis of *Barnes*.

In this regard, plaintiffs point to the provision of section 26:493 of the Louisiana Revised Statutes specifying that: "No parish or municipality shall, in the exercise of its *police power*, regulate the business of selling such beverages more than is necessary for the protection of the public health, morals, safety and peace." La. Rev. Stat. Ann. § 26:493 (West 1989) (emphasis added). This language, plaintiffs assert, does not constitute a delegation of Twenty-First Amendment authority, but, rather, is a grant of the state's police power, and that such grant of police power automatically triggers the standards of *Barnes*.

As noted earlier, the state's authority to regulate liquor trade and trafficking is found in the language of the Twenty-First Amendment. The United States Constitution's grant of the power enables the states to engage in that regulation; surely, then, it must be the state's delegation of a portion of that power to its political subdivisions that gives the subject Louisiana statute its life and validity.

This court refuses to compel the state to incant "Twenty-First Amendment" in order to validate delegation of one aspect of the power given it by the federal constitution. That the state has the power to regulate, that such power may be delegated, and that the state in this instance has done so cannot be weakened because the state does not specifically couple its delegation with the reference that the plaintiffs claim necessary. Indeed, the regulation of any aspect of human behavior by a governing authority is, as a practical matter, an exercise of the police power. The Twenty-First Amendment's grant of authority to exercise such power in the area of alcoholic beverages regulation is rendered no less effective by a failure of the state or the parish to use certain talismanic words.

There is ample state authority, then, for St. Tammany Parish to undertake the amendments to Chapter 3 of the Code of Ordinances, because all deal with the regulation of the sale and dispensing of alcoholic beverages within the respective areas of that parish. Having found that such regulation is authorized, and that the specific versions of Chapter 3 were enacted pursuant to such authorization, the court must turn to the merits of plaintiffs' claims.

B. The Merits of Plaintiffs' Case

The court first observes that, under *Barnes*, nude dancing is expressive conduct within the outer parameters of the First Amendment, albeit "only marginally so." 111 S. Ct. at 2640. *Barnes* also teaches that a court "must [first] determine the level of protection to be afforded *to the express conduct at issue* and must determine whether . . . [a] statute is an impermissible infringement of that protected activity." *Id.* (emphasis added). Additionally, even under the clear terms of Louisiana's authorizing statute, a parish or municipality is prohibited from exercising the delegated power in such a way as to regulate the business of selling such bever-

ages "more than is necessary for the protection of the public health, morals, safety, and peace." La. Rev. Stat. Ann. § 26:493 (West 1989).

All of these standards generate a factual inquiry, which the court is not authorized to make on a motion to dismiss, nor is it equipped to make at this evidentiary juncture of the proceedings. Ultimate resolution of the fate of the ordinance against the factual determination mandated by *Barnes*, and the "more than is necessary" yardstick of the statute, must await another day.

The court, however, must caution the parties that none should regard its observations in this instance as indicative of its ultimate resolution. While observing that nude dancing is not without First Amendment protection, the Supreme Court has specifically warned that such dancing is only marginally within that protection. In addition, given the rationale of *Iacobucci* and the power of a state (and therefore a subdivision thereof) to ban nude dancing as part of its liquor license program, it would seem clear that a state's interest in maintaining order by prohibiting nude dancing (or nearly nude dancing entertainment) may well fall outside the scope of the First Amendment's protection.

The court also cautions the parties that many of the cases dealing with this issue arise in the context of zoning regulations (clearly not involved here) or involve regulations prepared after specific findings developed as a result of public hearings or other appropirate proceedings. In addition, this case may well present other and less obvious concerns, such as the attempted retroactivity of essentially obscene conduct standards and accompanying due process problems.

The court today, however, only reaches the initial determination of whether plaintiffs have established a likelihood of success on the merits for the purposes of issuing a preliminary injunction. In so doing, the court finds

that the Parish apparently has enacted an ordinance pursuant to constitutional authority provided to it by the State of Louisiana, which regulates conduct that may be protected by the First Amendment. It is impossible, however, to determine the degree of protection that should be afforded to the conduct at issue here without a full evidentiary hearing. For these reasons, the court finds that the plaintiffs have failed to prove a likelihood of success on the merits at this time and, consequently, fail to meet the requisites for a preliminary injunction to issue.

CONCLUSION

The court, in conclusion, finds that it clearly has jurisdiction to hear this matter and the plaintiffs have standing to bring it. The plainitffs, however, have not met the burden of proving a likelihood of success on the merits and, thereby, fail to persuade the court that a preliminary injunction should issue. For the reasons expressed herein, the defendants' motion to dismiss and the plaintiffs' motion for a preliminary injunction are hereby DENIED.

IT IS SO ORDERED.

New Orleans, Louisiana, this 18th day of February 1992.

s/ George Arceneau
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3266

D.C. Docket No. CA 82 6 K

JOHN VONDERHAAR, *et al.*,
Plaintiffs-Appellants,

versus

PARISH OF ST. TAMMANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before WISDOM, JOLLY and DEMOSS, Circuit Judges.

JUDGMENT

[Filed Nov. 18, 1992]

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

November 18, 1992

ISSUED AS MANDATE: Dec. 10, 1992